APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

Docket No. 05-4744-cv

(Argued March 7, 2006 Decided September 21, 2006)

BUFFALO TEACHERS FEDERATION, BUFFALO EDUCATIONAL SUPPORT TEAM, NEA/NY, TRANSPORTATION AIDES OF BUFFALO, NEA/NY, SUBSTITUTES UNITED BUFFALO NEA/NY, BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, AFSCME LOCAL 264, PROFESSIONAL CLERICAL AND TECHNICAL EMPLOYEES' ASSOCIATION and LOCAL 409 INTERNATIONAL UNION OPERATING ENGINEERS,

Plaintiffs-Appellants,

v.

RICHARD TOBE, THOMAS E. BAKER, ALAIR TOWNSEND, H. CARL MCCALL, JOHN J. FASO, JOEL A. GIAMBRA, MAYOR ANTHONY MASIELLO, RICHARD A. STENHOUSE, ROGER G. WILMERS, in their official capacities as directors/members of the BUFFALO FISCAL STABILITY AUTHORITY and GEORGE E. PATAKI,

Defendants-Appellees.

Before: CARDAMONE, CALABRESI, and HALL, *Circuit Judges*.

CARDAMONE, *Circuit Judge*:

When a state is sued for allegedly impairing the contractual obligations of one of its political subdivisions even though it

is not a signatory to the contract, the state will not be held liable for violating the Contracts Clause of the United States Constitution unless plaintiffs produce evidence that the state's self-interest rather than the general welfare of the public motivated the state's conduct. On this issue, plaintiffs have the burden of proof because the record of what and why the state has acted is laid out in committee hearings, public reports, and legislation, making what motivated the state not difficult to discern. In the appeal before us, the record of why the state acted is available, and plaintiffs have not met their burden.

Plaintiffs are the Buffalo Teachers Union and a number of other unions in Buffalo, New York (Buffalo or City), representing public employees of the school district of the City of Buffalo—including teachers, principals, bus drivers, cooks, food service helpers, etc. (plaintiffs, unions, or appellants). Defendants are the Buffalo Fiscal Stability Authority (Buffalo Fiscal Authority, BFSA, or Board), its members, and New York State Governor George E. Pataki (collectively defendants). Plaintiffs, alleging that a wage freeze instituted by defendant Buffalo Fiscal Authority violates the Contracts Clause and the Takings Clause of the United States Constitution, sued defendants and sought a declaratory judgment with respect to the wage freeze's constitutionality and also an injunction against its enforcement.

Both sides moved for summary judgment. The United States District Court for the Western District of New York (Skretny, J.) granted summary judgment for defendants in a judgment dated and entered August 19, 2005.

BACKGROUND

A. *Buffalo's Fiscal Crisis & Comptroller's Report*

When in 2003 the speaker of the New York State Assembly became concerned by Buffalo's declining financial health, he requested the state comptroller's office to conduct a re-

view of the City's finances. The resulting report detailed Buffalo's financial situation. The report recounted that the City had been operating for several years with a structural deficit and had been able to continue operations only with state aid and the use of the City's reserves. Buffalo had relied increasingly on state aid to fund its budget increases (state aid grew from $67 million in 1997-98 to $128 million in 2002-03). The City faced exponential increases in its budget deficits; the comptroller projected budget deficits of $7.5 million for 2002-03, $30-$46 million for 2004-05, $76-$107 million for 2005-06, and $93-$127 million for 2006-07.

Based on these and other bleak findings, the comptroller concluded Buffalo was not in a position to resolve its fiscal woes on its own. For example, the record on this appeal shows that to remedy budgetary shortfalls, the City had already laid off 800 teachers and 250 assistant teachers over a four year period. The report therefore suggested legislative intervention. Specifically, the comptroller recommended the creation of a control board—namely the BFSA—to oversee Buffalo's finances. The board would have powers and duties similar to those given to boards that already oversaw the budgets of other fiscally troubled municipalities in New York State. The comptroller advised also that in the event of a board-declared fiscal crisis the board should have the power to freeze future wage increases.

B. *Buffalo Fiscal Stability Authority Act*

In light of the comptroller's report, the state legislature passed on July 3, 2003 the Buffalo fiscal stability authority act (Act) to address the City's financial crises. *See* N.Y. Pub. Auth. Law § 3850-a (McKinney Supp. 2006). To explain passage of the Act, the legislature stated,

> It is hereby found and declared that the city [of Buffalo] *is in a state of fiscal crisis*, and that the welfare of the inhabitants of the city is seriously threatened. The city

> budget must be balanced and economic recovery enhanced. Actions should be undertaken which preserve essential services to city residents, while also ensuring that taxes remain affordable. Actions contrary to these two essential goals jeopardize the city's long-term fiscal health and impede economic growth for the city, the region, and the state.

See 2003 N.Y. Sess. Laws Ch. 122 § 5695 (McKinney) (emphasis added); *see also* N.Y. Pub. Auth. Law § 3850-a (McKinney Supp. 2006) (setting forth legislative declaration of need for state intervention).

The aim of the Act is to have Buffalo achieve fiscal stability by 2007-08. *See* N.Y. Pub. Auth. Law § 3857(1) (McKinney Supp. 2006). To attain that goal, the Act created the Buffalo Fiscal Authority, a public benefit corporation. *See id.* § 3852(1). Central to the Act is a requirement that the City submit financial plans each year over a four year period to the Buffalo Fiscal Authority for approval. *See id.* §§ 3856 & 3857. Under the terms of the Act, the Board is to review, approve, and monitor implementation of the City's financial plans to ensure that the City is abiding by the fiscal limitations and benchmarks imposed by the Act. *See id.* §§ 3856-59. The Act also provides a means by which the Board may modify the financial plans to bring them into compliance with the Board's strictures. *Id.* § 3857. If Buffalo fails or refuses to modify its financial plans, the Board may take corrective steps on its own. *Id.* § 3857(2), 3858(2). In particular, the Board may impose a wage and/or hiring freeze upon a finding that such a freeze is "essential to the adoption or maintenance of a city budget or a financial plan" that is in compliance with the Act. *Id.* § 3858(2)(c)(i).

C. *Imposition of the Wage Freeze*

On October 21, 2003 the Buffalo Fiscal Authority approved the City's first four-year financial plan under the Act.

Prior to the submission of the plan, the Board had already ordered the City to institute a hiring freeze and had also instructed the City to exclude from the plan wage increases that were not contractually required. The City approved a tax increase for its 2004-05 budget and planned for another tax increase in the last year of the four-year plan; together the city tax increases amounted to $6.3 million.

Six months later, in reviewing how the plan's implementation was proceeding, the Board realized the plan no longer complied with the Act. The BFSA discovered that for the 2004-05 fiscal year Buffalo projected a budget gap $20 million greater than the $30 million gap previously estimated. The Board was further troubled by the estimate that the projected City budget gap for the next four years would exceed $250 million.

As a result of these concerns, on April 21, 2004 the Buffalo Fiscal Authority invoked its wage freeze power and determined "that a wage freeze, with respect to the City and all Covered Organizations, is essential to the maintenance of the Revised Financial Plan and to the adoption and maintenance of future budgets and financial plans that are in compliance with the Act." The Board further resolved that "effective immediately, there shall be a freeze with respect to all wages . . . for all employees of the City [which] shall apply to prevent and prohibit any increase in wage rates." The wage freeze took effect that day, and effectively prohibited members of the plaintiff unions from enjoying a two percent wage increase that the unions had negotiated as part of their labor contracts with the City.

D. *Prior Proceedings*

Following the imposition of the wage freeze, plaintiffs filed suit against the Board on June 17, 2004 in the district court, seeking a judgment declaring the wage freeze unconstitutional under the Contracts and Takings Clauses, and

seeking an injunction to bar the wage freeze's enforcement. On February 28, 2005 the parties filed cross-motions for summary judgment. After full briefing and oral argument, the district court denied plaintiffs' motion and granted summary judgment in favor of the defendants. It held that as a matter of law the wage freeze offended neither the Contracts or Takings Clauses of the Constitution. From the district court's judgment, plaintiffs appeal.

DISCUSSION

I. Standard of Review

Our standard of review here is well known. We review the grant of summary judgment *de novo, Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 262 (2d Cir. 2001), viewing the facts in the light most favorable to plaintiffs and resolving all factual ambiguities in their favor, *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 162 (2d Cir. 2006). Under this standard, we are only to "determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). With this in mind, we turn to plaintiffs' claims.

II. Contracts Clause

We begin with that part of the appeal relating to the Contracts Clause, a provision of the Constitution that even prior to its adoption was at the center of heated discourse. After 11 states had ratified the Constitution, James Madison lamented privately to Thomas Jefferson that the articles relating to treaties, paper money, and contracts "created more enemies than all the errors in the System positive & negative put together." Akhil Reed Amar, *America's Constitution: A Biography* 124 (Random House 2005) (quoting letter from James Madison to Thomas Jefferson, Oct. 17, 1788, in Madison, *Papers*, 11:297).

Our attention turns to this clause, which provides that no state shall pass any law "impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. Although facially absolute, the Contracts Clause's prohibition "is not the Draconian provision that its words might seem to imply." *Allied Structural Steel Co. v. Spannaus (Spannaus)*, 438 U.S. 234, 240 (1978). It does not trump the police power of a state to protect the general welfare of its citizens, a power which is "paramount to any rights under contracts between individuals." *Id.* at 241; *see also W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) ("[L]iteralism in the construction of the contract clause . . . would make it destructive of the pubic interest by depriving the State of its prerogative of self-protection."). Rather, courts must accommodate the Contract Clause with the inherent police power of the state "to safeguard the vital interests of its people." *Home Bldg. & Loan Ass'n v. Blaisdell (Blaisdell)*, 290 U.S. 398, 434 (1934); *see also Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992-93 (2d Cir. 1997). Thus, state laws that impair an obligation under a contract do not necessarily give rise to a viable Contracts Clause claim, *see U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 16 (1977).

To determine if a law trenches impermissibly on contract rights, we pose three questions to be answered in succession: (1) is the contractual impairment substantial and, if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) are the means chosen to accomplish this purpose reasonable and necessary. *Energy Reserves Group*, 459 U.S. at 411-13; *Sanitation & Recycling Indus.*, 107 F.3d at 993. We also consider the level of deference to give to a legislature's determination that a law was reasonable and necessary. We address each of these questions.

A. *Substantial Impairment and Legitimate Public Purpose*

We discuss questions (1) and (2) together. First, we agree with the district court that the wage freeze substantially impairs the unions' labor contracts with Buffalo. To assess whether an impairment is substantial, we look at "the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus.*, 107 F.3d at 993. Contract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract. The promise to pay a sum certain constitutes not only the primary inducement for employees to enter into a labor contract, but also the central provision upon which it can be said they reasonably rely. With that in mind, we may safely state the wage freeze so disrupts the reasonable expectations of Buffalo's municipal school district workers that the freeze substantially impairs the workers' contracts with the City. *See Ass'n of Surrogates and Sup. Ct. Reporters v. New York (Surrogates)*, 940 F.2d 766, 772 (2d Cir. 1991) (noting that a statute affecting timing of payment of salary substantially impaired public employees' contract).

Second, we next ask if the legislature had a legitimate public purpose in passing the Act and providing for a wage freeze. When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law. *See Energy Reserves Group*, 459 U.S. at 411-12; *Sanitation & Recycling Indus.*, 107 F.3d at 993. A legitimate public purpose is one "aimed at remedying an important general social or economic problem rather than providing a benefit to special interests." *Sanitation & Recycling Indus.*, 107 F.3d at 993. And as discussed in a moment, the purpose may not be simply the financial benefit of the sovereign.

The New York legislature had a legitimate public purpose in passing the Act and its wage freeze power. It is not

disputed that Buffalo was suffering at the time, and continues to suffer, a fiscal crisis. The state legislature passed the Act to address specifically the City's financial problems. *See* N.Y. Pub. Auth. Law § 3850-a (McKinney Supp. 2006) (declaring that "the city of Buffalo is facing a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state"). This is not a case in which the Act and wage freeze were passed "for the mere advantage of particular individuals," *Blaisdell*, 290 U.S. at 445; rather, the legislature passed the law "for the protection of a basic interest of society," *id.* Further, courts have often held that the legislative interest in addressing a fiscal emergency is a legitimate public interest. *See, e.g., id.* at 444-48 (statute impairing mortgages found to be constitutional in light of depression era exigencies); *In re Subway-Surface Supervisors Ass'n v. New York City Transit Auth. (Subway-Surface)*, 44 N.Y.2d 101, 112-14 (1978) (statute freezing municipal wages held to be constitutional given fiscal emergency afflicting New York City). We find no reason in the instant case to reach a conclusion contrary to that reached in the cited cases.

B. *Reasonableness and Necessity*

That a contract-impairing law has a legitimate public purpose does not mean there is no Contracts Clause violation. The impairment must also be one where the means chosen are reasonable and necessary to meet the stated legitimate public purpose. *U.S. Trust Co.*, 431 U.S. at 22-23; *see Sanitation & Recycling Indus.*, 107 F.3d at 993 ("A law that works substantial impairment of contractual relations must be specifically tailored to meet the societal ill it is supposedly designed to ameliorate."). If it is not, then the law offends the Contracts Clause.

Unless the state itself is a party to the contract, courts usually defer to a legislature's determination as to whether a particular law was reasonable and necessary. *See Energy Reserves*, 459 U.S. at 412-13. In this appeal, the parties

committed the majority of their arguments in their briefs to discussing the appropriate level of deference our court owes to the legislature here. Therefore, before we can answer the third question of reasonableness and necessity, we first address the issue of deference.

1. *Kinds of Deference*

Since *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), it has been familiar law that the Contracts Clause applies to public contracts as well as to private contracts. *Id.* at 694 (recognizing that salary contracts of public officers are entitled to Contracts Clause protection) (Marshall, C.J.); *see U.S. Trust Co.*, 431 U.S. at 17. However, in analyzing public contracts courts use a different approach than that employed in analyzing private ones. When a law impairs a private contract, substantial deference is accorded, *see Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998), to the legislature's "judgment[s] as to the necessity and reasonableness of a particular measure," *U.S. Trust Co.*, 431 U.S. at 23. Public contracts are examined through a more discerning lens. When the state itself is a party to a contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the [s]tate's self-interest is at stake." *Id.* at 26. When a state's legislation is self-serving and impairs the obligations of its own contracts, courts are less deferential to the state's assessment of reasonableness and necessity. *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993).

The parties disagree with respect to what level of deference we should apply. Plaintiffs argue that we owe little deference to the state's decision because the Act is, in their view, self-serving to the state, while defendants insist we owe substantial deference to the legislative judgment. Of particular significance in the case at hand is the absence of a contract to which New York State is a party. Defendants contend that substantial deference is due because New York State is not a

party to the contracts that are being impaired, that is, the state did not impair the obligations of its *own* contracts. *Id.* at 418. Plaintiffs concede that their contracts are with the City of Buffalo and that no state contracts or obligations run to them or to the City. But, they assert, that absence of a state contract does not preclude heightened scrutiny. The plaintiff unions urge us to focus on the alleged self-serving nature of the Act and the wage freeze. They argue that a less deferential standard applies because the wage freeze is in plaintiffs' view, self-serving insofar as it may save the state money by reducing future aid the state may feel obliged to give to the City.

Our initial comment is that the presence or absence of a state as a party to the contract is not determinative of the deference issue. Defendants ignore that a public contract is in fact being impaired albeit through state rather than local law. Were we to adopt defendants' reading, state legislatures could delegate to an agency the power to impair a public contract of a government subdivision that the subdivision itself would have more difficulty impairing. Lawmakers could fashion the powers delegated to the agency in a manner to insulate the agency's actions from constitutional attack. We decline to open such an end-run around Contracts Clause law. The better rule therefore calls for focusing on whether the contract-impairing law is self-serving, where existence of a state contract is some indicia of self-interest, but the absence of a state contract does not lead to the converse conclusion.

In other words, the absence of a contract with the state does not mean we thereby believe the wage freeze cannot be self-serving to the state. To the contrary, it can be. But, in the end, we do not think this is the sort of case in which the state legislature "welches" on its obligations as a matter of "political expediency," *see Surrogates*, 940 F.2d at 773; Guido Calabresi, *Retroactivity: Paramount Powers & Contractual Changes*, 71 Yale L.J. 1191, 1201-02 (1962), but rather, the

state was genuinely acting for the public good, *see Blaisdell*, 290 U.S. at 445; *Calabresi*, 71 Yale L.J. at 1202. For the purposes of this appeal, we need not resolve what level of deference to apply. Instead, we will assume that the lower level of deference applies because, as discussed below, the wage freeze is reasonable and necessary even under the less deferential standard.

2. *What Does Less Deference Mean?*

As stated above, assuming the state's legislation was self-serving to the state, we are less deferential to the state's assessment of reasonableness and necessity than we would be in a situation involving purely private contracts, but what does giving less deference to the legislature actually mean? We hasten to point out that less deference does not imply no deference. *See Local Div. 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 643 (1st Cir. 1981) (Breyer, J.) ("[W]here economic or social legislation is at issue, some deference to the legislature's judgment is surely called for."); *Subway-Surface*, 44 N.Y.2d at 112 (noting that "the statement of the principle [in *U.S. Trust Co.*] implies that some deference at least is appropriate"). Relatedly, we agree with the First Circuit that *U.S. Trust Co.* does not require courts to reexamine all of the factors underlying the legislation at issue and to make a *de novo* determination whether another alternative would have constituted a better statutory solution to a given problem. *See Local Div. 589*, 666 F.2d at 642. Nor is the heightened scrutiny to be applied as exacting as that commonly understood as strict scrutiny. Such a high level of judicial scrutiny of the legislature's actions would harken a dangerous return to the days of *Lochner v. New York*, 198 U.S. 45 (1905), *overruled, see DayBrite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), in which courts would act as superlegislatures, overturning laws as unconstitutional when they "believe[d] the legislature [ ] acted unwisely," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see Peick v. Pension*

Benefit Guar. Corp., 724 F.2d 1247, 1265 (7th Cir. 1983) ("The danger of heightened scrutiny, and the reason it has been as sparingly applied since its heyday in the *Lochner* era, is that it can easily mask the imposition by a court of a philosophical and economic straightjacket on the legislature."); *see also* Laurence H. Tribe, *Constitutional Choices* 182 (1985) (equating heightened scrutiny under the Contracts Clause as backdoor to *Lochner*-type jurisprudence). The *Lochner* doctrine, of course, "has long since been discarded." *Skrupa*, 372 U.S. at 730.

Ultimately, for impairment to be reasonable and necessary under *less deference scrutiny*, it must be shown that the state did not (1) "consider impairing the . . . contracts on par with other policy alternatives" or (2) "impose a drastic impairment when an evident and more moderate course would serve its purpose equally well," nor (3) act unreasonably "in light of the surrounding circumstances," *U.S. Trust Co.*, 431 U.S. at 30-31.

3. *The Wage Freeze is Reasonable and Necessary*

With the above standard in mind, we hold the wage freeze was reasonable and necessary. The legislature and Board did not treat the wage freeze on par with other policy alternatives. According to the Act, the Buffalo Fiscal Authority was empowered to enact the wage freeze provision only if it was essential to maintenance of the City's budget. N.Y. Pub. Auth. Law § 3858(2)(c) (McKinney Supp. 2006). We read this to mean the wage freeze must have been a last resort measure. Indeed the Board imposed the freeze only after other alternatives had been considered and tried. The Board first instituted a hiring freeze pursuant to its powers under the Act. Moreover, the City had already taken other more drastic measures including school closings and layoffs; in the four years prior to the wage freeze Buffalo eliminated 800 teaching and 250 teaching assistant positions. Only after these more drastic

steps were taken and a finding that the freeze was essential was made, did the BFSA institute the wage freeze.

This discussion dovetails with the second question of whether a more moderate course was available to remedy the fiscal crisis. As noted, the alternatives to the wage freeze consisted of elimination of more municipal jobs and school closures, alternatives which clearly are more drastic than a temporary wage freeze. Thus, in light of the surrounding circumstances, we cannot say the state or the Buffalo Fiscal Authority acted unreasonably.

The temporary and prospective nature of the wage freeze underscores further its reasonableness. The Supreme Court instructs that the extent of the impairment is "a relevant factor in determining its reasonableness." *U.S. Trust Co.*, 431 U.S. at 27. Here the impairment is relatively minimal. Under the terms of the Act, the temporary wage freeze must be revisited by the Board on an on-going basis to assure the freeze's continued necessity. N.Y. Pub. Auth. Law § 3858(2)(d) (McKinney Supp. 2006). Further, the wage freeze operates prospectively. In this respect the present facts are dissimilar to *U.S. Trust Co.*, a case that represents the paradigm of the type of protection that the Contracts Clause was designed to offer: protection "to those who invested money, time and effort against loss of their investment through explicit repudiation." *Local Div. 589*, 666 F.2d at 642 (discussing *U.S. Trust Co.*). The impairment here does not affect past salary due for labor already rendered or money invested. It only suspends temporarily the two percent increase in salary for services *to be* rendered.

In sum, the prospective and temporary quality of the wage freeze convinces us of its reasonableness. *See Blaisdell*, 290 U.S. at 447 (finding temporary nature of an impairment to be probative of reasonableness) *accord Spannaus*, 438 U.S. at 242-43; *Subway-Surface*, 44 N.Y.2d at 112-14 (attaching significance to the prospective characteristic of a law impairing

public contracts); *cf. Energy Reserves Group*, 459 U.S. at 418-19 (finding as probative the temporary aspect of an impairing regulation in a private contract case).

The unions argue the wage freeze was unnecessary because other alternatives existed. Namely, taxes could have been raised or other programs and services could have been eliminated or burdened. We cannot adopt this position for at least three reasons. First, it is always the case that to meet a fiscal emergency taxes conceivably may be raised. It cannot be the case, however, that a legislature's *only* response to a fiscal emergency is to raise taxes. Also, defendants have shown that Buffalo had already increased City taxes to meet its fiscal needs, and it is reasonable to believe that any additional increase would have further exacerbated Buffalo's financial condition. Second, even if the state could have raised its taxes, appellants have not shown how any monies so raised would flow to Buffalo. Finally, on the undisputed facts of this case, we find no need to second-guess the wisdom of picking the wage freeze over other policy alternatives, especially those that appear more Draconian, such as further layoffs or elimination of essential services. *See Blaisdell*, 290 U.S. at 447-48 ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *Local Div. 589*, 666 F.2d at 643 (noting that the court could have balanced alternatives to impairment, but concluding that "[a]nswering these sorts of questions . . . is a task far better suited to legislators than to judges"); *see also Sal Tinnerello & Sons*, 141 F.3d at 54 ("[I]t is not the province of this Court to substitute its judgement for that of . . . a legislative body.").

4. *Present Case Distinguishable From* Surrogates *and* Condell

We pause here to discuss why, contrary to the plaintiffs' assertions, this case is distinguishable from *Association of Surrogates & Supreme Court Reporters v. New York and*

Condell v. Bress. In *Surrogates*, New York State had allegedly impaired the labor contracts of certain judicial employees by instituting a payroll lag in which payment of their salaries would be delayed. *Surrogates*, 940 F.2d at 769. *Condell* involved a similar payroll lag that affected employees of the state executive branch. *Condell*, 983 F.2d at 417. Applying heightened Contracts Clause scrutiny, we held both payroll lag provisions unreasonable and unnecessary. *See Condell*, 983 F.2d at 418, 419-20; *Surrogates*, 940 F.2d 773-74.

The facts and circumstances of those cases nonetheless are dissimilar to those present here. In those cases we found the legislature's justifications of reasonableness and necessity to be dubious at best. That there was an emergency or dire need justifying the impairment was in doubt in those cases. *See, e.g., Surrogates*, 940 F.2d at 773 (assuming for argument sake only that expansion of the judiciary is an important public purpose but holding payroll lag not to be necessary to achieving that goal); *Condell*, 983 F.2d at 420 (implying that a fiscal crisis could be grave enough where a state might constitutionally impose a payroll lag but finding that the case before the court did not present such an emergency). For example, in *Surrogates* the state wanted to hire more judicial employees to help reduce the courts' back-log of cases. *Surrogates*, 940 F.2d 768-69. To fund this endeavor it instituted the payroll lag, rather than raise taxes to fund the additional service. *Id.* at 773. We determined that the lawmakers had impaired the state employees' contracts improperly, in part, on the basis of this political expediency. *See id.; Condell*, 983 F.2d at 420.

Here, no one questions the existence of a very real fiscal emergency in Buffalo. Additionally, as noted, there is no evidence in the record of an ill-motive of political expediency or unjustified welching. Contracts Clause cases involve individual inquiries, for no two cases are necessarily alike. *See*

Blaisdell, 290 U.S. at 430 ("Every case must be determined upon its own circumstances."). In the present case, we are comfortable that the wage freeze is reasonable and necessary to remedy the fiscal instability of Buffalo.

We point out that while the facts of *Surrogates* and *Condell* are inapposite, we find the New York state case, *In re Subway-Surface Supervisors Association v. New York City Transit Authority*, to be persuasive and relevant. In *Subway-Surface*, the New York Court of Appeals upheld the constitutionality of the New York State Financial Emergency Act for the City of New York, a state law which, like the wage freeze here, suspended wage increases of municipal workers. 44 N.Y.2d at 107-08. At the time, New York City was in the midst of a financial emergency, and to address the emergency, the state froze New York City municipal wages. *Id.* We find the instant case similar, especially because the fact of an emergency is not contested. Our holding can be summarized simply: An emergency exists in Buffalo that furnishes a proper occasion for the state and BFSA to impose a wage freeze to "protect the vital interests of the community," and the existence of the emergency "cannot be regarded as a subterfuge or as lacking in adequate basis." *Blaisdell*, 290 U.S. at 444. Nor can the wage freeze be regarded as unreasonable or unnecessary to achieve the important public purpose of stabilizing Buffalo's fiscal position.

III. Takings Clause

Plaintiffs appeal also the district court's denial of their Takings Clause claim. While we hold that no takings violation has occurred, we do so on different grounds than those relied on by the district court.

A. *Physical Taking or Regulatory Taking*

The Takings Clause of the Fifth Amendment provides that no "private property shall be taken for public use, without just

compensation." U.S. Const. amend. V. The clause applies to the states through the Fourteenth Amendment. *See Kelo v. New London*, __ U.S. __, 125 S. Ct. 2655, 2658 n.1 (2005).

The law recognizes two species of takings: physical takings and regulatory takings. *See Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995). Physical takings (or physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). The fact of a taking is fairly obvious in physical takings cases: for example, the government might occupy or take over a leasehold interest for its own purposes, *see United States v. Gen. Motors Corp.*, 323 U.S. 373, 375, 380 (1945), or the government might take over a part of a rooftop of an apartment building so that cable access may be brought to residences within, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). But when the government acts in a regulatory capacity, such as when it bans certain uses of private property, *see Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-85 (1926), or limits the rent a landlord may charge tenants, *see Fed. Home Loan Mortgage Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47-48 (2d Cir. 1996), or prohibits landlords from evicting tenants for refusing to pay higher rents, *see Block v. Hirsh*, 256 U.S. 135, 154 (1921), the question of whether a taking has occurred is more complex, *Tahoe-Sierra Pres. Council*, 535 U.S. at 323. Such cases are considered regulatory takings because they do not involve a categorical assumption of property. *See id.* The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence "effects a taking." *Meriden Trust & Safe Deposit Co.*, 62 F.3d at 454.

The district court analyzed the wage freeze as a physical taking. We believe this was in error. The wage freeze "does not present the 'classic taking' in which the government

directly appropriates private property for its own use." *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998). Rather, the interference with appellants' contractual right to a wage increase "arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The freeze therefore falls into the category of a regulatory, not physical, taking, and should have been analyzed as such. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (analyzing Takings Clause case involving "taking" of contracts rights under regulatory takings jurisprudence); *see also Tahoe-Sierra Pres. Council*, 535 U.S. at 323-24 (noting that physical invasion line of cases is inapplicable to regulatory takings analysis).

B. *Protectable Property*

In adjudging whether the Act constituted an unconstitutional taking, we take a moment here to ask the threshold question of whether a protectable property interest is even at stake. Although the Supreme Court has held that valid contracts constitute property under the Takings Clause, *Lynch v. United States*, 292 U.S. 571, 579 (1934), this is neither a blanket nor absolute rule, *see Connolly*, 475 U.S. at 224 ("[T]he fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking [but] [t]his is not to say that contractual rights are never property rights . . . ."), and further it is a rule that has been called into question, *Pro-Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 510 n.2 (7th Cir. 1995) ("We read *Connolly* . . . as effectively overruling, if it had not already been overruled, *Lynch v. United States*, 292 U.S. 571 [(1934)]."); *see also Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894, 900-02 (6th Cir. 1990) (distinguishing *Lynch* and holding that contract rights are not property); *Peick*, 724 F.2d 1247, 1274-76 (noting distinction between "property rights" which are protected under Takings Clause and "con-

tract rights" which are not necessarily protected). Our misgivings, however, need not detain us. We will assume for purposes of this appeal that the wage increase provisions of appellants' contracts constitute property under the Takings Clause.

C. *Regulatory Taking*

Regulatory takings analysis requires an intensive *ad hoc* inquiry into the circumstances of each particular case. *See Connolly*, 475 U.S. at 224. We weigh three factors to determine whether the interference with property rises to the level of a taking: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at 224-25. In considering these factors, we are not persuaded that plaintiffs have met the heavy burden necessary to establish a regulatory taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).

First, the severity of the economic impact of the freeze and the extent to which it interferes with appellants' investment-backed expectations are relatively small. The wage freeze is temporary and operates only during a control period. *See* N.Y. Pub. Auth. Law § 3858(2)(d) (McKinney Supp. 2006). What is more, this is not a case in which a law abrogates an entire contract. The freeze affects only a small increase in wages. As such plaintiffs continue to receive the same salary they had been receiving prior to the freeze's enactment. The freeze's prospective nature demonstrates also its limited economic impact and interference with appellants' investment-backed expectations. It does not affect wages for which services and labor have already been rendered.

Second, the nature of the state's action is uncharacteristic of a regulatory taking. The wage freeze is a negative restriction rather than an affirmative exploitation by the state.

Nothing is affirmatively taken by the government. Instead the government annuls something—namely, the appellants' contractual right to a wage increase. The freeze is in this respect like a temporary cap on how much plaintiffs may charge for their services. *See Fed. Home Loan Mortgage Corp.*, 83 F.3d at 48 (upholding rent stabilization as not a taking); *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993) (upholding price regulations that limit how much medical providers may charge Medicare patients).

Ultimately, and third, the temporary suspension of plaintiffs' wage increase arises from a public program that undoubtedly burdens the plaintiffs in order to promote the common good. *Connolly*, 475 U.S. at 225. Equally true is that the public program to help Buffalo obtain fiscal stability is one which the state had a right to initiate and regulate. We recognize the possibility that the net effect of the wage freeze may well be to take from Peter to pay Paul, but such burden shifting does not, without more, amount to a regulatory taking. *See id.* at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever the legislation requires one person to use his or her assets for the benefit of another.").

CONCLUSION

Accordingly, for the foregoing reasons, the state law constitutes neither a Contracts Clause nor Takings Clause violation. We therefore affirm the district court's order granting summary judgment in favor of defendants and denying summary judgment to plaintiffs.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

04-CV-457S

BUFFALO TEACHERS FEDERATION, BUFFALO EDUCATIONAL SUPPORT TEAM-NEA/NY, TRANSPORTATION AIDES OF BUFFALO, NEA/NY, SUBSTITUTES UNITED/BUFFALO-NEA/NY, BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, AFSCME LOCAL 264, PROFESSIONAL, CLERICAL AND TECHNICAL EMPLOYEES' ASSOCIATION AND LOCAL 409 INTERNATIONAL UNION OF OPERATING ENGINEERS,

Plaintiffs,

v.

RICHARD TOBE, THOMAS E. BAKER, ALAIR TOWNSEND, H. CARL MCCALL, JOHN J. FASO, JOEL A. GIAMBRA, MAYOR ANTHONY MASIELLO, RICHARD A. STENHOUSE AND ROBERT G. WILMERS, *in their official capacities as directors/members of the Buffalo Fiscal Stability Authority,*

Defendants.

DECISION AND ORDER

I. INTRODUCTION

On July 3, 2003, the legislature of the State of New York created the Buffalo Fiscal Stability Authority ("the Control Board") to stabilize and improve the city of Buffalo's failing financial health.[1] One of the powers the legislature vested in

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[1] The Buffalo Fiscal Stability Authority Act created the Buffalo Fiscal Stability Authority. To avoid confusion, this Court will refer to the Buffalo

the Control Board is the discretion to freeze wages. On April 21, 2004, the Control Board exercised that discretion and enacted a Wage Freeze Resolution, which for purposes of this case, had the effect of eliminating contractual salary increases that Plaintiffs had negotiated with the city of Buffalo school district.

Plaintiffs filed suit in this court challenging the Buffalo Fiscal Stability Authority Act (the "BFSA") and the Wage Freeze Resolution as violative of the Contract and Takings Clauses of the United States Constitution. Presently before me are the parties' competing Motions for Summary Judgment.[2] Having reviewed the motion papers and the applicable law, I find that the Wage Freeze Resolution is not unconstitutional. Rather, the state has acted properly within its police power to address the city of Buffalo's dire financial situation. The Wage Freeze Resolution is a reasonable and necessary means to remedy the city's economic inviability and secure the welfare of its residents. It serves the ultimate goal of restoring the city's fiscal independence. Accordingly, Plaintiffs' motion will be denied and Defendants' motion will be granted.

Fiscal Stability Authority Act as the "BFSA" and the Buffalo Fiscal Stability Authority as "the Control Board" throughout this decision.

[2] In support of their Motion for Summary Judgment, Plaintiffs filed the following documents: a memorandum of law, a Rule 56 Statement of Undisputed Facts, with appendix, and a reply memorandum of law. In opposition, Defendants filed a memorandum of law with exhibits.

In support of their Motion for Summary Judgment, Defendants filed the following: a memorandum of law, a Rule 56 Statement of Undisputed Facts, the Declaration of Dorothy A. Johnson, with attached exhibits, and a reply memorandum of law. In opposition, Plaintiffs filed a memorandum of law and a response to Defendants' Rule 56 Statement of Undisputed Facts.

II. BACKGROUND

A. The Parties and the Collective Bargaining Agreements

Plaintiffs are employee organizations that serve as the exclusive bargaining representatives for their respective employee units.[3] (Plaintiffs' Rule 56 Statement of Undisputed Facts ("Plaintiffs' Statement"), ¶ 1; Defendants' Rule 56 Statement of Undisputed Facts ("Defendants' Statement"), ¶¶ 1-8.) Defendants are directors/members of the Control Board, which is a public benefit corporation. (Defendants' Statement, ¶¶ 9, 10.)

Each Plaintiff employee organization is a party to a collective bargaining agreement with the city of Buffalo school district. (Plaintiffs' Statement, ¶ 2; Defendants' Statement, ¶¶ 1-8; 11, 13, 15, 17, 19, 21, 23, 25.) These agreements provide for periodic step increases and/or other types of salary increases, such as longevity payments, to be paid to the covered employees.[4] (Plaintiffs' Statement, ¶¶ 3-4; Defendants' Statement, ¶¶ 27, 29.) On average, the covered employees are contractually entitled to receive salary increases of roughly 2% per year. (Plaintiffs' Statement, ¶ 5.)

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[3] Plaintiffs represent individuals employed by the city of Buffalo school district in the following capacities: teachers; certain teachers' aides and health care aides; bus aides; substitute teachers; principals, assistant principals, directors, supervisors, project administrators and assistant superintendents; service center employees, cook managers and cafeteria employees; professional, clerical and technical personnel; and engineering personnel. (Defendants' Statement, ¶¶ 1-8.)

[4] This Court notes that the agreements between Plaintiffs and the school district have all expired and that successor agreements have not been entered. (Defendants' Statement, ¶¶ 13-26.) However, under New York's Civil Service Law, the terms of the expired agreements remain in force until new agreements are reached. *See* N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 1999); *Ass'n of Surrogates & Supreme Court Reporters v. State of New York*, 588 N.E.2d 51, 53 (N.Y. 1992).

B. The City of Buffalo's Fiscal Crisis

In May of 2003, the Speaker of the New York State Assembly requested that the State Comptroller's Office conduct a review of the city of Buffalo's finances. (Defendants' Statement, ¶ 58; Johnson Declaration, Exhibit D.) This review was intended to assist lawmakers in determining whether the city would need financial assistance from the state to close current and future budget gaps. (Defendants' Statement, ¶ 59; Johnson Decl., Exhibit C, p. 1.)

The State Comptroller's ensuing report detailed the city of Buffalo's desperate fiscal straits. (Johnson Decl., Exhibit C.) Among others, the State Comptroller made the following findings:

- The city of Buffalo had been operating with a structural deficit for several years, and was only able to fund its operations with increasing state aid and the use of its reserves. (Johnson Decl., Exhibit C, p. 1.)
- The city of Buffalo's budget increases since 1997-1998 were funded through increasing state aid, which grew from $67 million in 1997-1998 to $123 million in the city's 2002-2003 fiscal year. (Johnson Decl., Exhibit C, p. 12.)
- The city had a combined deficit for the fiscal years 2000-2001 and 2001- 2002 of $23.8 million, and the 2002-2003 budget as initially adopted was balanced only by exhausting the city's reserves. (Johnson Decl., Exhibit C, pp. 1, 12.)
- The city of Buffalo's estimated budget deficit for 2002-2003 was $7.5 million. The city also faced a 2004-2005 estimated budget deficit ranging from $30-$48 million up to $60-$78 million, depending on the Board of Education's budget. The city faced increased estimated deficits of $76-$107 and $93-$127 million

> in 2005-2006 and 2006-2007, respectively. (Johnson Decl., Exhibit C, pp. 1-2, 12, 20-22.)

The State Comptroller concluded that due to these continuing and serious structural imbalances, the city of Buffalo was not in a position to rectify its budget on its own. (Defendants' Statement, ¶ 62; Johnson Decl., Exhibit C, pp. 2, 30.) He also concluded that a new approach must be adopted by the city to restore its fiscal integrity. (Johnson Decl., Exhibit C, p. 30.) In the State Comptroller's view, it was incumbent upon the city to adopt financial plans and practices that would bring its recurring expenses in line with its recurring revenue. (Johnson Decl., Exhibit C, p. 30.) To that end, one of the State Comptroller's recommendations was that the state legislature create a control board to oversee and administer Buffalo's finances "to ensure that effective long-term restructuring takes place in Buffalo." (Defendants' Statement, ¶ 60; Johnson Decl., Exhibit C, p. 2.) The State Comptroller also recommended that the control board be given the power to freeze wages in the event of a declared fiscal crisis. (Johnson Decl., Exhibit C, p. 31.) The state legislature accepted both recommendations.

C. Enactment of the BFSA

On July 3, 2003, the New York State legislature enacted the BFSA. *See* N.Y. PUB. AUTH. LAW § 3850, et seq. (McKinney Supp. 2005). As indicated in the legislative declaration of need, the impetus of the BFSA was the city of Buffalo's crumbling finances, as evidenced in the State Comptroller's report:

> The legislature hereby finds and declares that the city of Buffalo is facing a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state. The legislature finds that the city has repeatedly relied on annual extraordinary increases in state aid to balance its budget, and that the state cannot continue to take such

> extraordinary actions on the city's behalf. The legislature further finds and declares the maintenance of a balanced budget by the city of Buffalo is a matter of overriding state concern, requiring the legislature to intervene to provide a means whereby: the longterm fiscal stability of the city will be assured, the confidence of investors in the city's bonds and notes is preserved, and the economy of both the region and the state as a whole is protected.

N.Y. PUB. AUTH. LAW § 3850-a.

In general, the BFSA requires the Control Board to monitor the city of Buffalo's financial plans on an ongoing basis to ensure that the city is adhering to the detailed fiscal requirements set forth in the BFSA. (Defendants' Statement, ¶ 56.) For example, the BFSA requires that the city prepare and submit to the Control Board a four-year (2004-2007) financial plan demonstrating, among other things, that annual operating expenses will not exceed annual operating revenues. N.Y. PUB. AUTH. LAW § 3857(1). The goal is for the city to steadily balance its budget gaps with less and less outside financial assistance until it can independently balance its budget in 2008-2009. N.Y. PUB. AUTH. LAW § 3857(1).

The city's financial plans must be approved by the Control Board. N.Y. PUB. AUTH. LAW §§ 3858(2)(a). The BFSA provides a mechanism by which the Control Board may review and modify the city's financial plans. N.Y. PUB. AUTH. LAW § 3857. If the city fails to modify its financial plans or fails to demonstrate that it is closing its budget gaps according to the requirements of the BFSA, the Control Board is vested with the authority to act to ensure that the city takes all necessary corrective actions. N.Y. PUB. AUTH. LAW §§ 3857(2), 3858(2). For example, the BFSA specifically authorizes the Control Board to impose a "wage and/or hiring freeze" upon a finding that such a freeze is "essential to the adoption or maintenance of a city budget or a financial plan that is in compliance with

[the BFSA]." N.Y. PUB. AUTH. LAW § 3858(2)(c)(i). The BFSA specifically provides that

> the [Control Board] shall be empowered to order that all increases in salary or wages of employees of the city and the employees of covered organizations which will take effect after the date of the order pursuant to collective bargaining agreements, other analogous contracts, or interest arbitration awards, now in existence or hereafter entered into, requiring such salary or wage increases as of any date thereafter are suspended.

N.Y. PUB. AUTH. LAW § 3858(2)(c)(i).

The BFSA further provides that the frozen wages shall not be paid retroactively:

> no retroactive pay adjustments of any kind shall accrue or be deemed to accrue during the period of wage freeze, and no such additional amounts shall be paid at the time a wage freeze is lifted, or at any time thereafter.

N.Y. PUB. AUTH. LAW § 3858(2)(c)(iii).

D. Implementation of the Wage Freeze

On October 21, 2003, the Control Board approved a four-year financial plan for the city. (Johnson Decl., Exh. A.) The Control Board continued to review and monitor the economic conditions of the city and the viability of the four-year plan as it is required to do under the BFSA. (Johnson Decl., Exh. A.) In doing so, the Control Board discovered that the immediate financial plan was out of balance, and that the city was projecting multiple increases in recurring expenditures, primarily related to personnel costs. (Johnson Decl., Exh. A.) Specifically, the Control Board determined that the city was projecting an increase in the 2004-2005 budget gap of more than $20 million above the $26 million gap projected in the financial plan, and that the projected cumulative gap over the next

financial plan would exceed $250 million. (Johnson Decl., Exh. A.)

Consequently, on April 21, 2004, the Control Board enacted Resolution No. 04-35, otherwise known as the Wage Freeze Resolution. (Defendants' Statement, ¶ 37; Johnson Decl., Exh. A.) This resolution was enacted based on the Control Board's finding that a wage freeze was "essential to the maintenance of the Revised Financial Plan and to the adoption and maintenance of future financial plans and budgets that are now in compliance with the [BFSA]." (Johnson Decl., Exh. A.) In pertinent part, the Control Board resolved as follows:

> RESOLVED AND ORDERED, that a wage freeze, with respect to the City and all Covered Organizations, is essential to the maintenance of the Revised Financial Plan and to the adoption and maintenance of future budgets and financial plans that are in compliance with the Act; and be it further
>
> RESOLVED AND ORDERED, that effective immediately, there shall be a freeze with respect to all wages, wage rates, and salary amounts for all employees of the City and all Nonexempt Covered Organizations, to the full extent authorized by the Act (the "Wage Freeze"), and be it further
>
> RESOLVED AND ORDERED, that this Wage Freeze shall apply to prevent and prohibit any increase in wage rates, wages or salaries for any employee of the City or a Nonexempt Covered Organization, including, but not limited to, any increased payments for holiday and vacation differentials, shift differentials, salary adjustments according to plan and step-ups or increments; and including increases in wage rates, wages or salaries pursuant to any plan or schedule for advancement or promotion; and including any increases in wage rates,

wages or salaries provided for under collective bargaining agreements, interest arbitration awards, employment agreements, or discretionary increases to non-represented employees, provided that such suspended salary or wage increase shall not be considered as part of compensation or final compensation or annual salary earned or earnable for the purpose of computing the pension base of any retirement allowances; and be it further

ORDERED AND RESOLVED, that the foregoing Wage Freeze shall apply to prevent and prohibit any increase in wage rates, wages or salaries that is scheduled to commence or otherwise take effect on or after the effective date of the Wage Freeze, notwithstanding that (a) the increase was bargained for, provided for in an existing collective bargaining agreement, or otherwise planned prior to the effective date of the Wage Freeze, and/or; (b) the increase is designated as retroactive, or otherwise purports to relate to work performed prior to the effective date of the Wage Freeze.

The wage freeze took effect immediately, on April 21, 2004. (Johnson Decl., Exh. A.)

E. Procedural History

On June 17, 2004, Plaintiffs commenced this action by filing a Complaint in the United States District Court for the Western District of New York. Defendants filed their Answer on July 27, 2004. On February 28, 2005, the parties filed Cross-Motions for Summary Judgment. After full briefing on the motions, this Court held oral argument on May 24, 2005, and reserved decision at that time.

III. DISCUSSION

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where the "pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under governing law." *Id.*

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." *Addickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). "Only when reasonable minds could not differ as to the import of evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

B. Nature of Plaintiffs' Challenge

Plaintiffs' Complaint contains two causes of action under 42 U.S.C. § 1983. First, Plaintiffs assert that the State of New York, acting by and through the Defendants, has impaired their contractual rights by imposing the wage freeze in violation of the Contract Clause of the United States Constitution. *See* U.S. CONST. art. I, § 10, cl. 1. Second, Plaintiffs contend that the state, acting by and through Defendants, has taken their private property without just compensation in violation of the Takings Clause of the Constitution. *See* U.S. CONST. amend. V.

Generally, a legislative Act may be challenged in two ways: (1) by establishing that it is wholly or facially, uncon-

stitutional or (2) by demonstrating that it is unconstitutional as applied in a particular way or as applied to a particular person or group. Here, Plaintiffs are limited to "as applied" challenges. This is because the BFSA itself does not diminish or eliminate Plaintiffs' contractual rights, nor does it alter or affect in any way Plaintiffs' collective bargaining agreements with the city of Buffalo school district.[5] Thus, the BFSA, standing on its own, does not substantially impair Plaintiffs' contractual rights. *See Cranley v. Nat'l Life Ins. Co. of Vt.*, 144 F.Supp.2d 291, 302 (D.Vt. 2001) (rejecting a facial challenge to a state statute under the Contract Clause where the statute itself did not affect the plaintiffs' contractual rights). Similarly, the enactment of the BFSA, in and of itself, has not deprived Plaintiffs of any property. It is only the Control Board's exercise of its remedial authority that arguably implicates the taking of a property interest. As such, any facial challenge to the BFSA under the Takings Clause would also fail.

Counsel argued at length about the true nature of Plaintiffs' challenge in this case. (*See, e.g.*, Tr. at 7-33[6]). Plaintiffs maintain that they are challenging both the BFSA and the Wage Freeze Resolution. They challenge the BFSA in the sense that it is the source of the Control Board's authority to freeze wages, but they ultimately challenge the Wage Freeze Resolution because it is the act that caused them injury.

Defendants interpret Plaintiffs' Complaint as challenging only the Control Board's decision to impose the wage freeze, to the exclusion of a constitutional challenge to the Control Board's authority to do so. Defendants' conclusion in this regard is supported by the text of the Complaint. For example,

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[5] At oral argument, Plaintiffs' counsel conceded that "the [BFSA] did nothing to our clients. The statute was not self-executing . . . ." (Tr. at 21.)

[6] Referring to the transcript of the oral argument before this Court on May 24, 2005.

the very first paragraph of the Complaint characterizes this action as a "challenge [to] a recently-adopted resolution by the Buffalo Fiscal Stability Authority ("BFSA")—Resolution No. 04-35." (Complaint, ¶ 1.) In the second paragraph, Plaintiffs identify the Wage Freeze Resolution, not the BFSA, as impairing their rights under the Contract and Takings Clauses. (Complaint, ¶ 2.) In fact, Plaintiffs' prayers for relief seek (1) a declaration that the *Wage Freeze Resolution* violates the Contract and Takings Clauses, (2) a declaration that the *Wage Freeze Resolution* is unconstitutional and all actions taken pursuant to it are void *ab initio*, and (3) an Order enjoining Defendants from further implementing the *Wage Freeze Resolution*. (Complaint, p. 12 (emphasis added).) As such, Defendants argue that this Court should not reach the constitutional issues presented by Plaintiffs.[7]

As Plaintiffs' counsel conceded at oral argument, the Complaint could indeed have been more artfully drafted to make clear the nature of Plaintiffs' constitutional claims and theories. (Tr. at 10, 11.) However, this Court will not exalt form over substance in this important case, and finds that Plain-

[7] Defendants also argue that this Court should not entertain Plaintiff's challenge to the BFSA because the Attorney General of the State of New York was not properly notified that this action involves a constitutional challenge to a state statute. Without commenting on whether notification was initially proper, this Court notes that the State Attorney General failed to intervene or otherwise involve himself in this case even after the Honorable Leslie G. Foschio, the United States Magistrate Judge assigned to this case, filed a Certification of Action Challenging the Constitutionality of a New York State Statute pursuant to 28 U.S.C. § 2403(b). By this Certification, notice was given that "Plaintiffs request for declaratory relief may also draw into question New York State's legislation creating and authorizing the [Control Board] to adopt the Wage Freeze Resolution." (Certification of Action, Docket No. 20, p. 1-2.) Accordingly, due to his inaction after the issuance of this Certification, this Court concludes that the State Attorney General would have declined to appear even if he had been notified of the nature of this action sooner. As such, Defendants have suffered no prejudice on this basis.

tiffs' Complaint meets the minimum requirements of notice pleading under Rule 8(a) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 8(a) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief"). Given the history and nature of this litigation, it would be a veiled fiction to conclude that Defendants were unaware that Plaintiffs intended to challenge the constitutionality of the state's action. Moreover, the parties have presented complete written and oral arguments on the constitutional issues. As such, this Court detects no prejudice to Defendants by entertaining Plaintiffs' constitutional challenge and will therefore proceed accordingly.

C. Contract Clause

The Contract Clause bars states from passing any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. However, this prohibition is not absolute. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92 (1977) ("Although the Contract Clause appears literally to proscribe any impairment, this court [has] observed that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." (quotation omitted)); *Sanitation & Recycling Indus. v. City of New York*, 107 F.3d 985, 992-93 (2d Cir. 1997) (Contract Clause limits the power of the state to abridge contractual relationships, but is not an absolute bar).

The Supreme Court has interpreted the Contract Clause as preserving "the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434, 54 S.Ct. 231, 78 L.Ed. 413 (1934)); *see also United States Trust*, 431 U.S. at 21; *Sanitation & Recycling Indus.*, 107 F.3d at 993 ("Contract Clause must be accommodated to the police power a state

exercises to protects its citizens"). The police power is described as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, [which] is paramount to any rights under contracts between individuals." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727 (1978).

It is well settled that not all state impairments of contracts violate the Contract Clause; rather "the Clause is not violated unless the impairment is a substantial one." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 52 (2d Cir. 1998) (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109-10, 117 L.Ed.2d 328 (1992)). This circuit employs a three-part test to determine whether a piece of legislation violates the Contract Clause:

> (1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.

Tinnerello, 141 F.3d at 52-53 (quoting *Sanitation & Recycling Indus.*, 107 F.3d at 993); *see also Cranley*, 144 F.Supp.2d at 302.

1. Substantial Impairment

The first step is to determine whether the state law at issue has resulted in an impairment that is substantial. "The primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus.*, 107 F.2d at 993 (citing *Energy Reserves*, 459 U.S. at 411).

Here, Plaintiffs argue that the elimination of their contractual rights to annual salary increases of roughly 2% per year

for an indeterminate amount of time constitutes a substantial impairment. Defendants do not persuasively challenge this assertion.[8] Indeed, lesser impairments in a similar context have been found by the circuit court to be substantial impairments. *See, e.g., Condell v. Bress*, 983 F.2d 415, 417-19 (2d Cir. 1993) (indefinite postponement of five days' pay under a lag payroll system found to be substantial impairment); *Ass'n of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766, 772 (2d Cir. 1991) (indefinite postponement of ten days' pay under a lag payroll system found to be substantial impairment). This is because

> [t]he affected employees have surely relied on full paychecks to pay for such essentials as food and housing. Many have undoubtedly committed themselves to personal long-term obligations such as mortgages, credit cards, car payments, and the like—obligations which might go unpaid in the months that the lag payroll has its immediate impact.

Surrogates, 940 F.2d at 772.

The Wage Freeze Resolution in the instant case impacts affected employees in the same manner. Plaintiffs' contracts call for 2% annual salary increases. Certainly a vast majority of Plaintiffs reasonably relied on receiving salary increases when making financial decisions, particularly whether to enter long-term financial commitments. Accordingly, this Court finds that the permanent cancellation of Plaintiffs' 2% annual salary increases is an impairment of contract that is substantial. This, of course, does not end the inquiry. The more difficult question is whether this substantial impairment is

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[8] This Court is not persuaded by Defendant's argument that a substantial impairment has not occurred because the wage freeze in this case is prospective. Such was also the case in *Condell v. Bress*, 983 F.2d 415, 417-19 (2d Cir. 1993) and *Ass'n of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766, 772 (2d Cir. 1991).

constitutionally permissible. *See Surrogates*, 940 F.2d at 771 ("finding an impairment of contract is merely a threshold step toward resolving the more difficult question whether that impairment is permitted under the Constitution" (internal quotation and citation omitted)).

2. Significant Social or Economic Purpose

The next inquiry tests the validity of the legislative purpose. To pass constitutional muster, the law at issue must have a "legitimate public purpose" and should be aimed at remedying an important "general social or economic problem." *Energy Reserves*, 459 U.S. at 411.

The parties offer somewhat different viewpoints on the purpose of the BFSA and by extension, the Wage Freeze Resolution. Plaintiffs contend that while the BFSA may have been primarily aimed at solving the city of Buffalo's fiscal crisis, it was also enacted to decrease or eliminate the amount of extraordinary financial aid the state had been providing to the city of Buffalo.[9] Defendants counter that the state enacted the BFSA not out of a desire to lessen its contributions to the city, but rather, to provide the city a framework within which it could work to regain its financial independence.

This Court is not persuaded by Plaintiffs' suggestion that part of the state's motivation in enacting the BFSA was to save itself money. In Plaintiffs' view, the state made a conscious decision to provide for a wage freeze so that it would not have to remit further aid to the city to cover the cost of the contractual salary increases. Plaintiffs seize on the legislature's finding that "the city has repeatedly relied on annual extraordinary increases in state aid to balance its budget, and

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[9] At oral argument, however, Plaintiffs' counsel appeared to concede that the BFSA was enacted to address the city of Buffalo's fiscal crisis. (*See* Tr. at 56 ("the [BFSA] as a whole is certainly devoted mostly to the interest of the citizens of Buffalo."); Tr. at 88 (conceding that the impetus of the BFSA was the financial crisis in the city of Buffalo).)

that the state cannot continue to take such extraordinary actions on the city's behalf," N.Y. PUB. AUTH. LAW § 3850-a, as dispositive evidence that the state's motivation in enacting the BFSA was, at least in part, financial. This legislative finding, however, cannot be considered in isolation. It comes in the context of the state's concern that one of its major municipalities is unable to balance its own budget. Read as such, this statement is not indicative of an underlying motivation to save money. Plaintiffs' narrow interpretation is simply not supported by the text of the BFSA, nor the legislative findings in support thereof.

A fair reading of the BFSA demonstrates that the state's motivation for enacting the BFSA was to rectify the city's inability to manage its own finances. For example, the state provided a detailed framework with very specific parameters and deadlines for the city of Buffalo to follow in order to get back on its feet and regain fiscal independence; it did not simply cease sending financial assistance to the city, which it could have done at any time. To the contrary, the BFSA contemplates and provides for *continuing* state aid to the city. *See, e.g.*, N.Y. PUB. AUTH. LAW §§ 3857, 3861.

Moreover, the legislative declaration of need for state intervention indicates that the city of Buffalo is facing "a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state." N.Y. PUB. AUTH. LAW § 3850-a. The reference to "assistance" can surely be read as suggesting financial assistance, as Plaintiffs would advocate, but reading the BFSA in its totality, it is more reasonable that the term "assistance" be read broadly. The BFSA on its face, for example, provides assistance in the form of a detailed financial recovery plan and an oversight commission—the Control Board. In fact, the legislature specifically found that

> maintenance of a balanced budget by the city of Buffalo is a matter of overriding state concern, requiring the legislature to intervene to provide a means whereby: the

> long-term fiscal stability of the city will be assured, the confidence of investors in the city's bonds and notes is preserved, and the economy of both the region and the state as a whole is protected.

N.Y. PUB. AUTH. LAW § 3850-a. As such, the purpose of the BFSA was to provide assistance to the city of Buffalo in the form of long-term solutions to the rampant budgetary problems that threatened the city's fiscal viability and endangered the welfare of its residents. This Court is convinced that the reason for the state's intervention was to assist the city in ameliorating and solving its financial crisis, not to simply reduce future state expenditures.

The historical and statutory notes underlying the enactment of the BFSA, the pertinent portion of which is set out in the margin, also supports this Court's conclusion.[10] It is clear

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[10] The historical and statutory notes provide, in relevant part, as follows:

> Legislative findings. The legislature hereby finds and declares that a condition of fiscal difficulty has existed for several years in the city of Buffalo, as a result of a weakened economy, population declines, and job losses. In recent months, the city's fiscal condition has been further weakened by the impact of the national economic recession, which has had a greater negative impact in Buffalo than in many other areas of the state. These factors have led to a structural imbalance between revenues and expenditures which, when combined with the city's limited ability to increase taxes on its residents, has resulted in a downgrade of Buffalo's bonds by independent bond rating services.
>
> It is hereby found and declared that the city is in a state of fiscal crisis, and that the welfare of the inhabitants of the city is seriously threatened. The city budget must be balanced and economic recovery enhanced. Actions should be undertaken which preserve essential services to city residents, while also ensuring that taxes remain affordable. Actions contrary to these two essential goals jeopardize the city's long-term fiscal health and impede economic growth for the city, the region, and the state.

that the thrust of the state's concern was with rebuilding the city of Buffalo's economic foundation. *See* 2003 N.Y. LAWS Ch. 122, S. 5695 (McKinney's). The legislature recognized the city's weakened economy and the fact that the city was in a state of fiscal crisis. *See id.* It therefore determined that the correct remedy would be a combination of enhanced budgetary discipline and short-term budgetary relief as set out in the BFSA, thus the imposition of the financial plan requirement and outside oversight. *See* N.Y. PUB. AUTH. LAW §§ 3856, 3857. The Wage Freeze Resolution itself is a direct response to the city's continued inability to properly manage its financial affairs and follow the approved four-year plan. (Johnson Decl., Exh. A.)

In sum, this Court finds that the BFSA and Wage Freeze Resolution have a legitimate public purpose, that being the stabilization of the city of Buffalo's budgetary problems and the resurrection of its fiscal independence. The purpose is not to save the state money. This Court further finds that the BFSA and Wage Freeze Resolution are aimed at remedying an important social problem, that being the economic inviability of the city and the threatened welfare of the city's residents. *Id.* The state is therefore acting within the proper scope of its police power. *See Energy Reserves*, 459 U.S. at 412 ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power. . . .").

3. Reasonable and Necessary Means

Having found the existence of a substantial impairment and a legitimate legislative purpose, the state's action can with-

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> It is, therefore, further found and declared that a combination of enhanced budgetary discipline and short-term budgetary discipline and short-term budgetary relief is necessary to assist the city in returning to fiscal and economic stability, while ensuring adequate funding for the provision of essential services and for the maintenance, expansion, and rebuilding of the infrastructure of the city.

2003 N.Y. LAWS Ch. 122, S. 5695 (McKinney's).

stand scrutiny "only if it is 'reasonable and necessary'" to serve the purposes of the BFSA. *Surrogates*, 940 F.2d at 772 (quoting *United States Trust Co.*, 431 U.S. at 25); *see also Sanitation & Recycling Indus.*, 107 F.3d at 302. The law must be "specifically tailored to meet the societal ill it is supposedly designed to ameliorate." *Sanitation & Recycling Indus.*, 107 F.3d at 302 (citing *Spannaus*, 438 U.S. at 243). Determining whether the means are reasonable and necessary is a difficult task, which must be "resolved by balancing the contractual rights of the individual against 'the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens.'" *Surrogates*, 940 F.2d at 771 (quoting *Home Building & Loan*, 290 U.S. at 435 (internal quotation and citation omitted)). An important component of conducting this inquiry is identifying the scope of deference due the state's action.

In the ordinary course involving private contracts, courts "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust*, 431 U.S. at 23. However, in cases where the state is self-interested and seeks to avoid or impair its own contractual obligations, deference to legislative judgment as to reasonableness and necessity is not appropriate:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it re-

> garded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 26; *see also County of Suffolk v. Long Island Lighting Co.*, 14 F.Supp.2d 260, 268 (E.D.N.Y. 1998) ("where the state seeks to evade its financial contractual obligations, the Supreme Court has indicated that the courts must apply something higher than the rational basis standard") (citing *United States Trust*, 431 U.S. at 26).

Plaintiffs argue that this Court should not defer to the state legislature in this case because the state's self-interest is at stake. They rest their argument on the Second Circuit's decisions in *Surrogates* and *Condell*. In *Surrogates*, the court faced a challenge to a lag payroll system enacted by the New York state legislature to fund the creation of new judgeships and court positions in the state's Unified Court System. At that time, New York was facing a fiscal crisis. To save money and to help finance the new positions, the legislature enacted a law imposing a lag payroll system for nonjudicial employees of the Unified Court System. The effect of the lag payroll was to delay payment of the affected employees' salaries until two weeks after the salaries were earned. Prior to this system, employees were paid their bi-weekly salaries immediately after the two weeks were worked. The ten days' pay that was withheld under the system was eventually payable to the employees at the termination of their employment with the state at the rate of pay applicable to them on the date of their separation.

The affected employees challenged the lag payroll system under the Contract Clause. In considering the plaintiffs' challenge, the court eschewed the deference typically afforded legislative judgment because it found that the lag payroll system was self-serving. *See Surrogates*, 940 F.2d at 771. In particular, the court found that the legislation was self-serving because it "impairs obligations of *its own* contracts." *Surrogates*, 940 F.2d at 771 (emphasis in original). Applying

heightened scrutiny, the court found that the lag payroll system was not necessary to achieve the state's goal of expanding the court system. *See id.* at 773.

> It cannot be said that a lag payroll for only judicial employees was essential in order to finance the expansion of the court system. The state could have shifted the seven million dollars from another government program, or it could have raised taxes. We recognize that neither alternative would have been popular among politician-legislators, but that is precisely the reasons that the contract clause exists—as a 'constitutional check on state legislation.'

Id. (quoting *Spannaus*, 438 U.S. at 241).

In essence, the court found that the existence of available alternatives to impairing the state's own contracts, albeit not as appealing, rendered the lag payroll system unconstitutional. *See Surrogates*, 940 F.2d at 774 ("The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available."). The Court reiterated the Supreme Court's admonition that "a State is not completely free to consider impairing the obligations of its own contracts on par with other policy alternatives." *United States Trust*, 431 U.S. at 30-31; *see Surrogates*, 940 F.2d at 773.

Approximately a year and a half later, the Second Circuit decided *Condell*. In *Condell*, the court was again faced with a lag payroll measure enacted by the State of New York, this one imposing a one week lag payroll on executive branch employees. The five days' of withheld salary was payable to the employees at the termination of their employment with the state, as it was in *Surrogates*.

The impetus of this system was a budget deficit estimated to be $1.005 billion in November 1990. The Governor had made public his desire to eliminate the budget deficit without

issuing Tax and Revenue Anticipation Notes, levying new taxes, raising rates on existing taxes or laying off additional executive branch employees. These options were considered, but rejected as unwise fiscal policy. The expected bounty from the lagged wages was $128 million. Following *Surrogates*, the court again found that the state was self-interested and struck down the legislation as unconstitutional under the Contract Clause because alternatives to the lag payroll measure were available. *See Condell*, 983 F.2d at 420.

Defendants argue that this case is distinguishable from *Surrogates* and *Condell*, and this Court agrees. Unlike the case at bar, *Surrogates* and *Condell* undisputedly involve self-serving legislation. Self-serving legislation, as the cases describe it, consists of two principal components: a direct financial benefit to the state, and the abrogation of the state's own contracts. *See United States Trust*, 431 U.S. at 25-26; *Surrogates*, 940 F.2d at 771-73, *Condell*, 983 F.2d at 418; *see also McDermott v. Cuomo*, No. 91-CV-57, 1992 WL 133900 (N.D.N.Y. June 11, 2002). In *Surrogates*, the state's purpose in enacting the lag payroll system was to gain a direct financial benefit of upwards of $7 million to devote to court expansion; in *Condell*, the state's purpose was to raise an estimated $128 million to apply to deficit reduction. In both cases, the state blatantly and directly impaired its own contractual obligations to raise revenue.

The BFSA and Wage Freeze Resolution, however, involve neither a direct financial benefit to the state, nor a direct abrogation of the state's own contracts. Because of this, the BFSA and Wage Freeze Resolution are not self-serving like the legislation considered in *Surrogates* and *Condell*. As previously discussed herein at length, the state legislature did not enact this legislation as a money saving measure. Its purpose, rather, was to stabilize the city of Buffalo's budgetary problems and resurrect its fiscal independence.

It is undisputed that *no* direct revenue to the state is generated by the wage freeze. Plaintiffs' nonetheless contend that the state gains a benefit by not having to provide the city with additional financial assistance to cover the cost of Plaintiffs' wage increases. This argument is purely theoretical. At first blush, it is obvious that the city of Buffalo is the entity that immediately benefits by not having to pay the cost of the salary increases. After all, it is the city, not the state, that is party to the underlying contracts and responsible for making payment. More important, there is no evidence supporting Plaintiffs argument that there is a direct correlation between the cost of Plaintiffs' salary increases and the amount of additional assistance the state would have to provide to the city. That is, if the cost of Plaintiffs' salary increases is "x," there is no evidence that the city would require corresponding state aid in the amount of "x" to cover those salary increases.

A myriad number of factors play into the city's need for financial assistance from the state. Plaintiffs have presented no evidence that the city would require additional state aid for the specific purpose of paying Plaintiffs' salary increases. As such, Plaintiffs have not demonstrated that the implementation of their salary increases would necessarily increase the city's need from the state.

Plaintiffs' theory contains an additional flaw. Plaintiffs concede that the state has no legal duty to provide financial assistance to the city. (Tr. at 36.) Indeed, there is complete agreement that the state's past aid to the city of Buffalo has not come as the result of any legal compulsion. While Plaintiffs argue that the state may have a moral or political motivation to assist the city, the fact remains that there is no legal requirement that it do so. In the absence of such a requirement, it cannot be said that the state gains anything from the wage freeze. For if there is no duty to provide funds in the first place, the state receives nothing from a possible reduction in the amount of its benevolent giving. At the end

of the day, the state does not receive a direct financial benefit as a result of the wage freeze.

As to the second component, *Surrogates* and *Condell* involved the state directly abrogating its own contracts. It relieved itself of a financial obligation by reneging on its promise to pay its employees immediately upon the completion of their work. The state was, in essence, forcibly borrowing money directly from the affected employees to fund court expansion and debt reduction. The Second Circuit specifically emphasized that the reason that state action in both cases was impermissible was because the state had violated its own contract. *See, e.g., Surrogates*, 940 F.2d at 771 (lag payroll system was self-serving because it "impairs obligations of *its own* contracts" (emphasis in original)); *see also McDermott*, 1992 WL 133900, at *2 -*5 (lag payroll system struck down where state was impairing its own contracts). In stark contrast, the state here is not a party to the contracts at issue and gains nothing from the implementation of the wage freeze. The contracts are between Plaintiffs and the city of Buffalo's school district. The state is therefore not impairing its own contract. There is no redistribution of funds from Plaintiffs to the state as there was in *Surrogates* and *Condell.*

Accordingly, this Court finds that this case falls outside of *Surrogates* and *Condell* because it does not involve "self-serving" legislation. While this finding insulates the legislation in this case from the "searching analysis" performed in *Surrogates* and *Condell*, it does not completely answer the question of how much deference should be paid to the legislature's action.

As stated previously, when private contracts are at issue, courts ordinarily "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust*, 431 U.S. at 23. And when the state impairs its own contracts for its own financial gain, courts review the act with more searching scrutiny, but nonetheless afford the state

"some" deference. *See United States Trust*, 431 U.S. at 26; *Long Island Lighting Co.*, 14 F.Supp.2d at 268; *see also Baltimore Teachers Union, Am. Fed. of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1019 and n. 10 (4th Cir. 1993) (discussing *United States Trust* and concluding that "some" deference remains due to self-serving legislative policy decisions). This case falls somewhere in between.

In this Court's view, this case presents circumstances closer to the impairment of a private contract than to self-serving impairment of a public contract. The State is impairing a contract that it is not a party to, yet the contract is a public contract. Accordingly, this Court will not completely defer to the state legislature's determinations, but will afford the legislature more than "some" deference.

In judging whether the state's determinations in this case are reasonable and necessary, this Court is mindful that "the inherent police power of the State 'to safeguard the vital interests of its people'" must be preserved. *Energy Reserves*, 459 U.S. at 410 (quoting *Home Bldg. & Loan*, 290 U.S. at 434). As the Second Circuit has noted, the "Contract Clause must be accommodated to the police power a state exercises to protect its citizens." *Sanitation & Recycling Indus.*, 107 F.3d at 993. The intersection of the state's police power and the protections of the Contract Clause therefore presents difficult terrain. It requires a careful balancing of the contractual rights of the individual with the state's inherent power to ensure the welfare of its citizenry. *See Spannaus*, 438 U.S. at 241; *see also Home Building & Loan*, 290 U.S. at 435; *Surrogates*, 940 F.2d at 771.

This Court first finds that the state's enactment of the BFSA and imposition of the wage freeze resolution is reasonable. Under the BFSA, a wage freeze can only be imposed under certain circumstances and for a limited duration. First, a wage freeze can only be imposed during a "control period."

N.Y. PUB. AUTH. LAW § 3858(2). A "control period" consists of that period of time when the city is working toward compliance with the requirements of the BFSA. *See* N.Y. PUB. AUTH. LAW §§ 3851(10), 3858(1). The Control Board is not authorized to impose a wage freeze while serving in an advisory capacity. *See* N.Y. PUB. AUTH. LAW §§ 3851(1), 3858(2). Second, a wage freeze can only be imposed if the Control Board finds that it is "essential to the adoption or maintenance of a city budget or a financial plan [under the BFSA]." N.Y. PUB. AUTH. LAW § 3858(2)(c). Absent such a finding, no wage freeze can be imposed. Third, any imposition of a wage freeze must be periodically reviewed by the Control Board. N.Y. PUB. AUTH. LAW § 3858(2)(d). Finally, the wage freeze will only remain in place until the Control Board determines that the fiscal crisis warranting the wage freeze has abated. N.Y. PUB. AUTH. LAW § 3858(2)(d).

Further, this Court finds that the BFSA and Wage Freeze Resolution are necessary to address the city of Buffalo's financial predicament. It is undisputed that the city of Buffalo was drowning year after year in a fiscal crisis. Plaintiffs have not challenged any of the findings regarding the city's ongoing financial predicament. Plaintiffs nonetheless argue that imposition of the wage freeze is not necessary because the state has other alternatives. Again, Plaintiffs rely on *Surrogates* and *Condell*.

Again, however, these cases are distinguishable. In *Surrogates* and *Condell*, the Second Circuit applied searching scrutiny when determining whether the state's decision to impair its own contracts was necessary. This level of scrutiny applied, of course, because the state was acting in its own self-interest. Under heightened scrutiny, the court looked to whether the state had exhausted all of its available alternatives, no matter how politically unpopular, before resorting to abrogating or modifying its own contracts. Because the state had not done so, the Court found that the impairment of its

own contracts was not necessary or essential to achieve its stated goals.

Such heightened level of scrutiny does not apply in this case because the state, as discussed above, is not acting in its own self-interest. Under the circumstances presented here, where the state is validly exercising its police power, the level of searching scrutiny performed in *Surrogates* and *Condell* does not apply. Rather, this Court affords considerable deference (less than complete deference, but greater than some deference) to the state's decision that a wage freeze is necessary to achieve the goals of the BFSA. In doing so, this Court finds that the wage freeze is both reasonable and necessary to remedy the dire financial situation facing the city of Buffalo. At bottom, this Court finds that the state validly exercised its legitimate police power by specifically tailoring this legislation to the social ill it was designed to ameliorate. *See Sanitation & Recycling Indus.*, 107 F.3d at 302. As such, no violation of the Contract Clause has occurred.[11]

D. Takings Clause

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This clause is made applicable to the states through the Fourteenth Amendment. *See Kelo v. City of New London, Connecticut*, __ U.S. __, 125 S.Ct. 2655, 2658 n. 1, __ L.Ed.2d __ (2005) (citing *B.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). The Takings Clause imposes two conditions on a state's authority to take private property: "the taking must be

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[11] This Court notes, as did Defendants, that the constitutionality of similar wage freezes has been upheld in other jurisdictions. *See, e.g., Baltimore Teachers Union, Am. Fed. of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993); *Subway-Surface Supervisors Ass'n. v. New York City Transit Auth.*, 375 N.E.2d 384 (N.Y. 1978).

for a public use and just compensation must be paid to the owner." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231, 123 S.Ct. 1406, 1417, 155 L.Ed.2d 376 (2003) (internal quotations omitted); *see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power"). The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *see also Mejia v. City of New York*, No. 01 Civ. 3381, 2004 WL 2884407, at *4 (S.D.N.Y. Dec. 10, 2004) (citing *Armstrong*).

Generally speaking, there are two types of takings. The quintessential taking is one where "a direct government appropriation or physical invasion of private property" occurs. *Lingle v. Chevron U.S.A., Inc.*, __ U.S. __, 125 S.Ct. 2074, 2081, __ L.Ed.2d __ (2005); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457, 150 L.Ed.2d 592 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use."); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-323, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (describing the Supreme Court's jurisprudence involving physical takings to be "as old as the Republic").

The other type of taking is one first recognized in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), where "the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo*, 533 U.S. at 617 (discussing *Pennsylvania Coal*). This type of taking is com-

monly referred to as a "regulatory taking." "Regulatory takings are based on the principle that 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" *Ganci v. New York City Transit Auth.*, No. 04 Civ. 1346, 2005 WL 850915, at *4 (S.D.N.Y. April 13, 2005) (citing *Pennsylvania Coal*, 260 U.S. at 415).

To establish a violation of the Takings Clause, Plaintiffs must first demonstrate that they possess a property interest that is protected by the constitution. *See Mejia*, 2004 WL 2884407, at *4 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)). Second, they must establish that the government deprived them of that interest for public purposes. *See Ganci*, 2005 WL 850915, at *4. Third, Plaintiffs must prove that the government did not provide just compensation. *See id.*

Here, Plaintiffs argue that the first type of taking has occurred, that is a physical taking. In fact, Plaintiffs expressly deny that the state's action constitutes a regulatory taking, and this Court offers no opinion on that issue.[12] (*See, e.g.*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, p. 14 ("this is not a 'regulatory takings' case . . . it is rather a 'categorical takings' case"); Tr. at 78 (indicating that no regulatory taking has occurred).

The first and third inquiries present no problem. The Supreme Court has stated that contract rights are a form of property for purposes of the Takings Clause. *United States Trust*, 431 U.S. at 19 n. 16 ("Contract rights are a form of property and as such may be taken for a public purpose

[12] For the sake of completeness, this Court notes that Defendants argue that Plaintiffs' Takings claim should be analyzed under the "regulatory takings" line of authority. However, because Plaintiffs have made clear that they are not asserting a regulatory taking claim, that line of authority is not instructive here.

provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579, 545 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (finding that valid contracts are property within the meaning of the Takings Clause). Accordingly, for purposes of this stage of the analysis, this Court finds that as to the first inquiry, Plaintiffs' contractual rights to salary increases warrant constitutional protection. Moreover, as to the third inquiry, it is agreed that Plaintiffs have not received any compensation related to the wage freeze.

The second inquiry is whether the state has taken Plaintiffs' property for its own proposed use. This is where Plaintiffs' physical taking claim fails. Just compensation is required when the government directly acquires private property for a public purpose. *Brown*, 538 U.S. at 233. Here, as discussed at length above, the state has not itself taken any private property for a public purpose.

Physical takings cases involve the government directly appropriating private property for its own use. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (Government appropriation of rooftop to provide cable television access constituted a taking); *United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (Government's seizure and operation of a coal mine to prevent national strike of coal miners effected a taking); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (Government's use of private airspace to approach government airport required compensation); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed.311 (1945) (Government's occupation of private warehouse effected a taking).

Plaintiffs argue that the state enacted the BFSA and imposed the wage freeze in order to eliminate the need for it to provide the city of Buffalo with extraordinary financial aid. To that end, Plaintiffs argue that the state, through the Control Board, has permanently taken their contract rights for the

public purpose of reducing the amount of state aid that must be paid to the city of Buffalo. This Court has already rejected this line of argument in the context of Plaintiffs' Contract Clause claim. There simply is no evidence in the record supporting the claim that the state made a purposeful decision to take Plaintiffs' salary increases to offset future aid to the city. Here, the state has not directly appropriated property for its own use.

Finally, Plaintiffs have not provided this Court with any cases holding that a wage freeze constitutes an unconstitutional physical taking under the Takings Clause, and this Court's research did not reveal any. Indeed, none of the principal cases relied upon by the parties presented Takings claims or otherwise applied a Takings analysis to wage modification legislation.

Accordingly, this Court finds that the state has not appropriated or physically taken Plaintiffs' property to fulfill a public purpose. Therefore, no violation of the Fifth Amendment has occurred. *Lingle*, 125 S.Ct. at 2081 (describing the "classic taking" as one where "the government directly appropriates private property"); *Palazzolo*, 533 U.S. at 617 ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use.").

IV. CONCLUSION

For the reasons discussed above, this Court finds that the BFSA and the Wage Freeze Resolution are not unconstitutional as either violative of the Contracts Clause or the Takings Clause. Rather, this Court finds that the state has acted properly within its police power to address a significant social and economic problem—the city of Buffalo's dire financial situation. Accordingly, Plaintiffs' motion will be denied and Defendants' motion will be granted.

V. ORDERS

IT HEREBY IS ORDERED, that Plaintiffs' Motion for Summary Judgment (Docket No. 22) is DENIED.

FURTHER, that Defendants' Motion for Summary Judgment (Docket No. 23) is GRANTED.

FURTHER, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: August 18, 2005
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed NOV 27, 2006]

Thurgood Marshall U.S. Court House
40 Foley Square
New York 10007

Docket Number 05-4744-cv
DC Docket Number: 04-cv-457
DC: WDNY (BUFFALO)
DC Judge: Honorable William Skretny

BUFFALO TEACHERS FEDERATION,

v.

TOBE,

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of November two thousand six.

Buffalo Teachers Federation, Buffalo Educational Support Team NEA/NY, Transportation Aides of Buffalo, NEA/NY, Substitutes United Buffalo NEA/NY, Buffalo Council of Supervisors and Administrators, AFSCME Local 264, Professional Clerical and Technical Employees' Association and Local 409 International Union Operating Engineers,

Plaintiffs-Appellants,

v.

Richard Tobe, Thomas E. Baker, Alair Townsend, H. Carl McCall, John J. Faso, Joel A. Giambra, Mayor Anthony

Masiello, Richard A. Stenhouse, Roger G. Wilmers, in their official ca[p]acities as directors/members of the Buffalo Fiscal and George E. Pataki,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Appellant Buffalo Teachers Federation, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: [Illegible]
Motion Staff Attorney

APPENDIX D

TITLE 2—BUFFALO FISCAL STABILITY AUTHORITY

Section

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Historical and Statutory Notes

L.2003, c. 122 legislation

L.2003, c. 122, § 1, provides:

"§ 1. Legislative findings. The legislature hereby finds and declares that a condition of fiscal difficulty has existed for several years in the city of Buffalo, as a result of a weakened economy, population declines, and job losses. In recent months, the city's fiscal condition has been further weakened by the impact of the national economic recession, which has had a greater negative impact in Buffalo than in many other areas of the state. These factors have led to a structural imbalance between revenues and expenditures which, when combined with the city's limited ability to increase taxes on its residents, has resulted in a downgrade of Buffalo's bonds by independent bond rating services.

"It is hereby found and declared that the city is in a state of fiscal crisis, and that the welfare of the inhabitants of the city is seriously threatened. The city budget must be balanced and economic recovery enhanced. Actions should be undertaken which preserve essential services to city residents, while also ensuring that taxes remain affordable. Actions contrary to these two essential goals jeopardize the city's long-term fiscal health and impede economic growth for the city, the region, and the state.

"It is, therefore, further found and declared that a combination of enhanced budgetary discipline and short-term budgetary relief is necessary to assist the city in returning to fiscal and economic stability, while ensuring adequate funding for the provision of essential services and for the maintenance, expansion, and rebuilding of the infrastructure of the city. If the city financial plan incorporates the annual targets required by this act for .recurring cost-saving measures, the Buffalo fiscal stability authority shall make savings available to the city through a restructuring of a portion of the city's

outstanding debt, and/or through limited borrowing for operating costs, in either case, secured by an intercept of sales tax net collections as well as state aid.

"It is hereby further found and declared that a control and advisory finance authority should be established to oversee the city's budget, financial and capital plans; to issue bonds, notes or other obligations to achieve budgetary savings through debt restructuring; to finance short-term cash flow or capital needs; and, if necessary, to develop financial plans on behalf of the city if the city is unwilling or unable to take the required steps toward fiscal stability.

"Based upon the fiscal crisis in the city of Buffalo, the legislature through this act creates a Buffalo fiscal stability authority with certain control, advisory and borrowing powers, and imposes on the city of Buffalo certain requirements as to budgetary operations and fiscal management, including minimum annual requirements to produce recurring budget savings in increasing amounts over the next four years. The agreements for financial and budgetary discipline between the authority and the city shall be for such period as is necessary under the standards set forth in this act to restore the city of Buffalo to fiscal integrity, with a control or advisory role for the authority continuing until June 30, 2037."

§ 3850. Short title

This title shall be known and may be cited as the "Buffalo fiscal stability authority act."

§ 3850-a. Legislative declaration of need for state intervention

The legislature hereby finds and declares that the city of Buffalo is facing a severe fiscal crisis, and that the crisis cannot be resolved absent assistance from the state. The legislature finds that the city has repeatedly relied on annual extraordinary increases in state aid to balance its budget, and

that the state cannot continue to take such extraordinary actions on the city's behalf. The legislature further finds and declares that maintenance of a balanced budget by the city of Buffalo is a matter of overriding state concern, requiring the legislature to intervene to provide a means whereby: the long-term fiscal stability of the city will be assured, the confidence of investors in the city's bonds and notes is preserved, and the economy of both the region and the state as a whole is protected.

§ 3851. Definitions

For the purposes of this title, unless the context otherwise requires: 1. "Advisory period" means that period no earlier than July first, two thousand six, after which the authority has determined that (a) for each of the three immediately preceding city fiscal years, the city has adopted and adhered to budgets covering all expenditures, other than capital items, the results of which did not show a deficit, without the use of any authority assistance, as provided for under section thirty-eight hundred fifty-seven of this title, when reported in accordance with generally accepted accounting principles and (b) the comptroller and the state comptroller jointly certify that securities were sold by the city during the immediately preceding city fiscal year in the general public market and that there is a substantial likelihood that such securities can be sold by the city in the general public market from such date through the end of the next succeeding city fiscal year in amounts that will satisfy substantially all of the capital and cash flow requirements of the city during that period in accordance with the financial plan then in existence. The joint certification made by the comptroller and the state comptroller shall be based on their separate written determinations which may take into account a report and opinion of an independent expert in the marketing of securities selected by the authority as well as other information available to the comptrollers. Once begun, an advisory period shall continue

through June thirtieth, two thousand thirty-seven unless a control period is imposed.

2. "Authority" or "Buffalo fiscal stability authority" or "BFSA" means the public benefit corporation created by this title.

3. "BFSA assistance" means: (a) the amount of debt service savings in a given city fiscal year generated from the proceeds of bonds, notes or other obligations made available to or for the benefit of the city or any covered organization as determined by the authority; or (b) the proceeds of any deficit financing authorized by the authority, or some combination thereof pursuant to the provisions of section thirty-eight hundred fifty-seven of this title. Such assistance shall be made available only upon a declaration of need by the city pursuant to section thirty-eight hundred sixty-one of this title and the approval of the BFSA board.

4. "Bonds, notes or other obligations" means bonds, notes and other evidences of indebtedness, issued or incurred by the authority.

5. "Chief fiscal officer" means the chief fiscal officer of the city as defined in section 2.00 of the local finance law.

6. "City" means the city of Buffalo.

7. "City charter" means the city government law of the city of Buffalo, as amended.

8. "City tax revenues" means the portion of the county's "net collections", as defined in section twelve hundred sixty-two of the tax law, payable to the city under the agreement among the county, the city and the cities of Lackawanna and Tonawanda entered into pursuant to the authority of subdivision (c) of section twelve hundred sixty-two of the tax law. In the event that the city imposes sales and compensating use taxes pursuant to the authority of section twelve

hundred ten of the tax law, "city tax revenues" shall also include net collections from such city taxes.

9. "Comptroller" means the comptroller of the city.

10. "Control period" means that period of time from the effective date of this title, continuing until the authority determines that conditions have been met as provided in subdivision one of this section and the city qualifies for the onset of an advisory period. A control period may be reimposed as determined by the authority in accordance with section thirty-eight hundred fifty-eight of this title.

11. "Council" means the city council of the city of Buffalo.

12. "County" means the county of Erie.

13. "Covered organization" means the city school district, the joint schools construction board of the city, as described in chapter six hundred five of the laws of two thousand, as amended, and the Buffalo municipal housing authority and any governmental agency, public authority or public benefit corporation which receives or may receive moneys directly, indirectly or contingently from the city, but excluding the authority and (a) any other governmental agency, public authority or public benefit corporation specifically exempted from the provisions of this title by order of the authority upon application of such agency, public authority, or corporation to the authority or on the authority's own motion upon a finding by the authority that such exemption does not materially affect the ability of the city to adopt and maintain a budget pursuant to the provisions of this title, or (b) any state public authority defined in section two hundred one of the civil service law, unless specifically named above; provided, however, that the authority may terminate any exemption granted by order of the authority pursuant to this subdivision upon a determination that the circumstances upon which such exemption was granted are no longer applicable.

14. "Director of the budget" means the director of the budget of the state.

15. "Financeable costs" or "costs" means costs to finance (a) amounts necessary to accomplish a refunding, repayment or restructuring of a portion of the city's outstanding indebtedness or that of any covered organization, (b) cash flow needs of the city or any covered organization, (c) any object or purpose of the city or any covered organization, for which a period of probable usefulness is prescribed in section 11.00 of the local finance law, including the costs of any preliminary studies, surveys, maps, plans, estimates and hearings, (d) amounts necessary to finance a portion of the operating costs of the city or any covered organization as provided in section thirty-eight hundred fifty- seven of this title, to the extent approved by the authority, or (e) incidental costs, including, but not limited to, legal fees, printing or engraving, publication of notices, taking of title, apportionment of costs, and capitalized interest, insurance premiums, costs related to items authorized in subdivisions seven through nine of section thirty-eight hundred fifty-four of this title or any underwriting or other costs incurred in connection with the financing thereof; provided however that, to the maximum extent practicable, all financeable costs shall not adversely affect the requirements of subdivision two of section thirty-eight hundred sixty-nine of this title.

16. "Financial plan" means the financial plan of the city and the covered organizations to be developed pursuant to section thirty-eight hundred fifty-seven of this title, as from time to time amended.

17. "Major operating funds" means the city general fund, the board of education general fund, the city enterprise funds, the board of education special project funds, together with any other funds of the city or a covered organization from time to time designated by the authority.

18. "Mayor" means the mayor of the city.

19. "Presiding officer" means the presiding officer of the council elected pursuant to the rules of the council.

20. "Projected gap" means the excess, if any, of annual aggregate projected expenditures over annual aggregate projected revenues for the major operating funds in each year of a financial plan as determined by the city and certified by the authority. For purposes of determining the projected gap in each fiscal year, annual aggregate projected revenues shall not include the amount of BFSA assistance expected to be available for such fiscal year.

21. "Revenues" means revenues of the authority consisting of city tax revenues, school district tax revenues, state aid revenues, and all other aid, rents, fees, charges, gifts, payments and other income and receipts paid or payable to the authority or a trustee for the account of the authority, to the extent such amounts are pledged to bondholders.

22. "State" means the state of New York.

23. "State aid" means: all general purpose local government aid; emergency financial assistance to certain cities; emergency financial assistance to eligible municipalities; supplemental municipal aid; and any successor type of aid and any new aid appropriated by the state as local government assistance for the benefit of the city.

24. "State aid revenues" means state aid paid by the state comptroller to the authority pursuant to this title.

25. "State comptroller" means the comptroller of the state.

26. "School district tax revenues" means the portion of the county's "net collections," as defined in section twelve hundred sixty-two of the tax law, payable to the city's dependent school district by the county pursuant to the authority of subdivision (a) of section twelve hundred sixty-two of the tax law.

27. "Cash flow borrowings" means:

(a) notes issued by the authority on behalf of the city, the city's dependent school district or any other covered organization, the proceeds of which are used to address temporary cash flow needs of the city, the city's dependent school district or the applicable covered organization; and

(b) bonds, notes and other obligations issued by the authority to refund notes of the authority described in paragraph (a) of this subdivision.

28. "Obligations of the city" means bonds, notes and other evidences of indebtedness issued or incurred by the city.

§ 3852. Buffalo fiscal stability authority

1. There is hereby created the Buffalo fiscal stability authority. The authority shall be a corporate governmental agency and instrumentality of the state constituting a public benefit corporation.

2. The authority shall conduct meetings as often as deemed necessary to accomplish its purposes, but not less than quarterly during a control period, and annually during an advisory period.

3. The authority shall continue until its control, advisory or other responsibilities, and its liabilities have been met or otherwise discharged, which in no event shall be later than June thirtieth, two thousand thirty-seven. Upon the termination of the authority, all of its property and assets shall pass to and be vested in the city.

§ 3858. Control period

1. A control period shall begin as of the effective date of this title and may be reimposed during an advisory period if the authority determines at any time that a fiscal crisis is imminent or that any of the following events has occurred or that there is a substantial likelihood and imminence of such

occurrence: (a) the city shall have failed to adopt a balanced budget, financial plan or budget modification as required by sections thirty-eight hundred fifty-six and thirty-eight hundred fifty-seven of this title, (b) the city shall have failed to pay the principal of or interest on any of its bonds or notes when due, (c) the city shall have incurred an operating deficit of one percent or more in the aggregate results of operations of any major fund of the city or a covered organization during its fiscal year assuming all revenues and expenditures are reported in accordance with generally accepted accounting principles, subject to the provisions of this title, (d) the chief fiscal officer's certification at any time, at the request of the authority or on the chief fiscal officer's initiative, which certification shall be made from time to time as promptly as circumstances warrant and reported to the authority, that on the basis of facts existing at such time such officer could not make the certification described in subdivision one of section thirty-eight hundred fifty-one of this title, or (e) the city shall have violated any provision of this title. A control period shall terminate when the authority has determined that the city qualifies for the onset of an advisory period as provided under subdivision one of section thirty-eight hundred fifty-one of this title. After onset of an advisory period, the authority shall annually consider paragraphs (a) through (e) of this subdivision and determine whether, in its judgment, any of the events described in such paragraphs have occurred and the authority shall publish each such determination. Any certification made by the chief fiscal officer hereunder shall be based on such officer's written determination which shall take into account a report and opinion of an independent expert in the marketing of municipal securities selected by the authority, and the opinion of such expert and any other information taken into account shall be made public when delivered to the authority. Notwithstanding any part of the foregoing to the contrary, in no event shall any control period continue beyond June thirtieth, two thousand thirty-seven.

2. In carrying out the purposes of this title during any control period, the authority:

(a) shall approve or disapprove the financial plan and the financial plan modifications of the city, as provided in sections thirty-eight hundred fifty-six and thirty-eight hundred fifty-seven of this title, and shall formulate and adopt its own modifications to the financial plan, as necessary; such modifications shall become effective upon their adoption by the authority;

(b) may set a maximum level of spending for any proposed budget of any covered organization;

(c) may impose a wage and/or hiring freeze: (i) During a control period, upon a finding by the authority that a wage and/or hiring freeze is essential to the adoption or maintenance of a city budget or a financial plan that is in compliance with this title, the authority shall be empowered to order that all increases in salary or wages of employees of the city and employees of covered organizations which will take effect after the date of the order pursuant to collective bargaining agreements, other analogous contracts or interest arbitration awards, now in existence or hereafter entered into, requiring such salary or wage increases as of any date thereafter are suspended. Such order may also provide that all increased payments for holiday and vacation differentials, shift differentials, salary adjustments according to plan and step-ups or increments for employees of the city and employees of covered organizations which will take effect after the date of the order pursuant to collective bargaining agreements, other analogous contracts or interest arbitration awards requiring such increased payments as of any date thereafter are, in the same manner, suspended. For the purposes of computing the pension base of retirement allowances, any suspended salary or wage increases and any other suspended payments shall not be considered as part of compensation or final compensation or of annual salary earned or earnable.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, this subdivision shall not be applicable to employees of the city or employees of a covered organization subject to a collective bargaining agreement or an employee of the city or a covered organization not subject to a collective bargaining agreement where the collective bargaining representative or such unrepresented employee has agreed to a deferment of salary or wage increase, by an instrument in writing which has been certified by the authority as being an acceptable and appropriate contribution toward alleviating the fiscal crisis of the city. Any such agreement to a deferral of salary or wage increase may provide that for the purposes of computing the pension base of retirement allowances, any deferred salary or wage increase may be considered as part of compensation or final compensation or of annual salary earned or earnable;

(iii) Notwithstanding the provisions of subparagraphs (i) and (ii) of this paragraph, no retroactive pay adjustments of any kind shall accrue or be deemed to accrue during the period of wage freeze, and no such additional amounts shall be paid at the time a wage freeze is lifted, or at any time thereafter.

(d) shall periodically evaluate the suspension of salary or wage increases or suspensions of other increased payments or benefits, and may, if it finds that the fiscal crisis, in the sole judgment of the authority has abated, terminate such suspensions;

(e) shall review and approve or disapprove any collective bargaining agreement to be entered into by the city or any covered organization, or purporting to bind, the city or any covered organization. Prior to entering into any collective bargaining agreement, the city or any covered organization shall submit a copy of such collective bargaining agreement to the authority, accompanied by an analysis of the projected costs of such agreement and a certification that

execution of the agreement will be in accordance with the financial plan. Such submission shall be in such form and include such additional information as the authority may prescribe. The authority shall promptly review the terms of such collective bargaining agreement and the supporting information in order to determine compliance with the financial plan, and shall disapprove any collective bargaining agreement which, in its judgment, would be inconsistent with the financial plan. No collective bargaining agreement binding, or purporting to bind, the city or any covered organization after the effective date of this title shall be valid and binding upon the city or any covered organization unless first approved by resolution of the authority.

(f) shall act jointly with the city in selecting members of any interest arbitration panel. Notwithstanding any other evidence presented by the city, the covered organization or any recognized employee organization, the arbitration panel must, prior to issuing any final decision, provide the authority with the opportunity to present evidence regarding the fiscal condition of the city;

(g) shall take any action necessary in order to implement the financial plan should the city or any covered organization have failed to comply with any material action necessary to fulfill the plan, provided, however, the authority shall provide seven (7) days notice of its determination that the city or any covered organization has not complied prior to taking any such action.

(h) may review and approve or disapprove contracts or other obligations binding or purporting to bind the city or any covered organization;

(i) shall, with respect to any proposed borrowing by or on behalf of the city or any covered organization on or after July first, two thousand three, review the terms of and comment, within thirty days after notification by the city or cov-

ered organization of a proposed borrowing, on the prudence of each proposed issuance of bonds or notes to be issued by the city or covered organization and no such borrowing shall be made unless first reviewed, commented upon and approved by the authority. The authority shall comment within thirty days after notification by the city or covered organization of a proposed borrowing to the mayor, the comptroller, the council, the director of the budget and the state comptroller and indicate approval or disapproval of the proposed borrowing. Notwithstanding the foregoing, neither the city nor any covered organization shall be prohibited from issuing bonds or notes to pay outstanding bonds or notes; and, provided further, the first issuance of debt pursuant to chapter six hundred five of the laws of two thousand, as amended, shall be excluded from this requirement;

(j) may review the operation, management, efficiency and productivity of the city and any covered organizations as the authority may determine, and make reports thereon; examine the potential to enhance the revenue of the city or any covered organization; audit compliance with the financial plan in such areas as the authority may determine; recommend to the city and the covered organizations such measures relating to their operations, management, efficiency and productivity as the authority deems appropriate to reduce costs, enhance revenue, and improve services so as to advance the purposes of this title;

(k) may require the city to undertake certain actions to advance serious and in-depth exploration of a merger of services with the county, including identification and analysis of options; development of a detailed fiscal and programmatic plan; identification of city, county, and state impediments; and fostering of informed public debate;

(*l*) may review and approve or disapprove the terms of any proposed settlement of claims against the city or any covered organization in excess of fifty thousand dollars;

(m) may obtain from the city, the covered organizations, comptroller, and the state comptroller, as appropriate, all information required pursuant to this section, and such other financial statements and projections, budgetary data and information, and management reports and materials as the authority deems necessary or desirable to accomplish the purposes of this title; and inspect, copy and audit such books and records of the city and the covered organizations as the authority deems necessary or desirable to accomplish the purposes of this title;

(n) may perform such audits and reviews of the city and any agency thereof and any covered organizations as it deems necessary; and

(o) may issue, from time to time and to the extent it deems necessary or desirable in order to accomplish the purposes of this title, to the appropriate official of the city and each covered organization, such orders necessary to accomplish the purposes of this title, including, but not limited to, timely and satisfactory implementation of an approved financial plan. Any order so issued shall be binding upon the official to whom it was issued and failure to comply with such order shall subject the official to the penalties described in subdivision three of this section.

3. (a) During any control period (i) no officer or employee of the city or of any of the covered organizations shall make or authorize an obligation or other liability in excess of the amount available therefor under the financial plan as then in effect; (ii) no officer or employee of the city or of any of the covered organizations shall involve the city or any of the covered organizations in any contract or other obligation or liability for the payment of money for any purpose required to be approved by the authority unless such contract has been so approved and unless such contract or obligation or liability is in compliance with the approved financial plan as then in effect.

(b) No officer or employee of the city or any of the covered organizations shall take any action in violation of any valid order of the authority or shall fail or refuse to take any action required by any such order or shall prepare, present or certify any information (including any projections or estimates) or report to the authority or any of its agents that is false or misleading, or, upon learning that any such information is false or misleading, shall fail promptly to advise the authority or its agents thereof.

(c) In addition to any penalty or liability under any other law, any officer or employee of the city or any of the covered organizations who shall violate paragraph (a) or (b) of this subdivision shall be subject to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office by order of either the governor or the mayor; and any officer or employees of the city or any of the covered organizations who shall knowingly and willfully violate paragraph (a) or (b) of this subdivision shall, upon conviction, be guilty of a misdemeanor.

(d) In the case of a violation of paragraph (a) or (b) of this subdivision by an officer or employee of the city or of a covered organization, the mayor or the chief executive officer of such covered organization shall immediately report to the authority all pertinent facts together with a statement of the action taken thereon.